No. 9442

United States
Circuit Court of Appeals
For the Ninth Circuit

BARNARD-CURTISS COMPANY,
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

Brief of Appellants

Howard Toole
W. T. Boone
Attorneys for Appellant.

Upon Appeal from The District Court of The United States for The District of Montana.

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JURISDICTION

This is an appeal from a judgment entered in the District Court of the United States for the District of Montana, Missoula Division, in an action on several contracts. The plaintiff, Ernest Maehl, a citizen and resident of the State of Montana, sued the defendant, Barnard-Curtiss Company, a corporation, and a citizen and resident of the State of Minnesota.

The amount in controversy is and was in excess of the sum of $3,000.00, exclusive of interest and costs. The cause was originally filed in the District Court of the State of Montana, in and for the County of Granite, and on petition and order was removed for trial to the United States District Court, in and for the District of Montana, Missoula Division.

The jurisdiction of the District Court of the United States is found in section 41, Title 28, United States Codes Annotated, section (1) (b); (Judicial Code, Section 24 as amended) wherein the United States District Court is given jurisdiction over causes between citizens of different states where the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

The appellate jurisdiction of the United States Circuit Court of Appeals is in section 225, Title 28, United States Codes Annotated (first paragraph); (Judicial Code, section 128 amended) wherein the Circuit Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to the Supreme Court.

QUESTIONS PRESENTED

1. Whether, in an action by plaintiff to recover an amount alleged to be due him on an alleged verbal contract for clearing and grubbing the timber from a reservoir site in Granite County, Montana, a motion made by the defendant, Barnard-Curtiss Company, for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to said action (R. 38 to R. 55) should have been sustained in view of the fact that C. A. Metcalf was claiming that the defandant, Barnard-Curtiss Company, owed him the same amount of money per acre for clearing and grubbing the same reservoir under the same alleged verbal contract, rule 14 (a) and rule 22 (1) Rules of Civil Procedure for the District Courts of the United States, adopted pursuant to the act of June 19, 1934, and effective September 1, 1938.

2. Whether the plaintiff, Ernest Maehl, made sufficient proof of a verbal contract between him and the defendant, Barnard-Curtiss Company, for clearing and grubbing the timber from a reservoir site in Granite County, Montana, to justify the trial court in submitting plaintiff's first cause of action for clearing (R. 2) and plaintiff's second cause of action for grubbing (R. 4) to a jury and in denying defendant's motion for a directed verdict (R. 353-354).

3. Whether the plaintiff, Ernest Maehl, in an action upon an alleged verbal contract for clearing and grubbing the timber from a reservoir site in Granite Coun-

ty, Montana (R. 2-3-4) made sufficient proof of performance of said contract to justify the trial court in submitting the cause to a jury and in denying defendant's action for a directed verdict (R. 353-354).

4. Whether, in an action upon an alleged verbal contract for clearing and grubbing the timber from a reservoir site in Granite County, Montana, there was a fatal variance between the pleadings and the proof where the plaintiff, Ernest Maehl, admitted that the alleged contract if made was made between the plaintiff, Ernest Maehl and one C. A. Metcalf and was to be performed by the plaintiff Ernest Maehl and one C. A. Metcalf acting together whereas the complaint alleges that the alleged verbal contract was made between the plaintiff, Ernest Maehl, alone and the defendant.

5. Whether, in an action on a verbal contract for clearing and grubbing the timber from a reservoir site consisting of an area of about 118 acres the defendant, Barnard-Curtiss Company, made sufficient uncontradicted proof of the execution and breach of a written contract covering an additional 50 acres of clearing to require the trial court to direct a verdict in the sum of $3320.09 (R. 355) in favor of the defendant against the plaintiff on defendant's counterclaim for breach of the written contract (R. 30).

6. Whether, in an action by plaintiff, Ernest Maehl, against the defendant, Barnard-Curtiss Company, wherein plaintiff in the complaint (R. 2 et seq.) alleged seven separate causes of action, to-wit: First, for

$3439.70 for clearing 118 acres of the reservoir site on an alleged verbal contract of $100.00 per acre (R. 2); second, for $1300.00 for grubbing 20 acres under an alleged verbal contract at $65.00 per acre (R. 4); third, for work, labor and services alleged to have been performed by plaintiff for defendant in preparing and saving 6000 mine stulls (R. 7); fourth, for $105.60 for services alleged to have been rendered defendant by plaintiff in transporting workmen from Philipsburg, Montana, to a road camp (R. 8); fifth, in the amount of $64.00 for services alleged to have been rendered by plaintiff to defendant for hauling workmen from Philipsburg, Montana, to the dam site on Rock Creek (R. 9); sixth, in the amount of $148.05 for services alleged to have been rendered to defendant by plaintiff as Superintendent and foreman in camp construction (R. 6); seventh, in the amount of $91.40 for tools alleged to have been furnished by plaintiff to defendant (R. 12); and wherein defendant denies the making of the contracts contained in each of said causes of action and alleges affirmatively first, that it had a verbal agreement with the plaintiff, Ernest Maehl, to clear and grub 6.98 acres on the dam site and not on the reservoir site (R. 24) which contract said plaintiff failed to perform and under which plaintiff became liable to defendant for $774.45 for breach of contract and second, in which the defendant alleges the making of a written contract for clearing an additional 50 acres of the reservoir site (R. 26, R. 30) and the breach of said contract

by reason whereof defendant counter-claims in the amount of $8,942.36, a motion for a reference to a master for the purpose of taking evidence (R. 56) should have been sustained.

STATEMENT

In the fall of 1935 Barnard-Curtiss Company, a Minnesota corporation, authorized to engage in the construction business in Montana, filed a bid with the Montana Water Conservation Board (Montana State Water Board) bidding to construct what is referred to as the Flint Creek dam in Granite County, Montana, (R. 188). Among other items in the contract was an item for clearing the reservoir site which consisted of an area in excess of 118 acres. The contract also contained an item of clearing and grubbing between six and eight acres on the site of the proposed dam. There is some question as to the acreage involved in this action but that question is not material because the variance between the parties is slight.

At the time when the Flint Creek dam project was advertised for letting Barnard-Curtiss Company was constructing a highway job about 10 or 12 miles away (R. 189).

A man named C. A. Metcalf and also the plaintiff, Ernest Maehl, had worked for Barnard-Curtiss Company prior to that time (R. 189) and J. A. Barnard, secretary-treasurer, went to see these men and drove them out to the site of the dam (R. 190). This was in the fall of 1935 (R. 190). It is admitted by Mr. Barn-

ard (R. 192) and by Mr. Maehl, the plaintiff, on cross examination (R. 168) that the discussion or conversation had to do with Metcalf and Maehl taking a contract together for the clearing. Mr. Maehl, the plaintiff, after stating that Mr. James Barnard and his brother, Bob Barnard, had accompanied him and Mr. Metcalf to the site of the reservoir (R. 167) stated that the proposal was that he, Maehl, and Metcalf were going in together on the clearing. His testimony on cross examination was as follows (R. 168):

> "Q. Well I know he asked you but Mr. Metcalf was right there and you and Mr. Metcalf were together, weren't you?
>
> "A. Yes.
>
> "Q. And it was your intention and Mr. Metcalf's to do the work together, isn't that so?
>
> "A. At that time yes.
>
> "Q. And all the conversation was about you and Mr. Metcalf doing the job together?
>
> "A. Yes at that time.
>
> "Q. And even though Mr. Barnard turned to you and said 'Maehl what will you do this clearing for,' Mr. Metcalf was there, and you knew that he referred to you and Metcalf?
>
> "A. Well he didn't say it in them words.
>
> "Q. But you knew that was it didn't you?
>
> "A. We figured on going together if we got that contract.
>
> "Q. And the conversation in 1935. that conversation was all with respect to you and Metcalf getting together and taking the clearing together?
>
> "A. At that time yes."

However, in the fall of 1935, Barnard-Curtiss Company was not low bidder for the construction of the dam (cross examination of Ernest Maehl) (R. 116) and

the project was awarded to another contractor by the Montana State Water Board (R. 195) (R. 117). The contractor to whom the work was awarded (R. 195) refused to proceed and the project was re-advertised the next year, 1936 (R. 195). Barnard-Curtiss Company bid on it a second time and was the low bidder (R. 196).

Mr. Barnard went out to the Rock Creek road job being done by Barnard-Curtiss Company and again met Mr. Maehl in 1936 at which time, according to Mr. Maehl's own testimony Mr. Barnard said to him, "Maehl will you stand by the agreement you made last year?" His words were as follows (R. 168-169):

> "Q. Then in 1936 Metcalf wasn't with you at all was he?
>
> "A. No.
>
> "Q. And you say Mr. Barnard came out on the West Fork job—that was a road job—and said 'Maehl will you stand by the agreement you made last year?' I believe that's what you said?
>
> "A. Yes sir.
>
> "Q. And you said 'Yes?'
>
> "A. Yes.
>
> "Q. And that was all that was said?
>
> "A. That's all.
>
> "Q. Sir?
>
> "A. That was all.
>
> "Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?
>
> "A. No.
>
> "Q. You and Metcalf never went together to do the clearing, did you?
>
> "A. No we didn't."

As shown by defendant's Exhibit 2 (R. 130) which was an assignment slip from the National Reemploy-

ment Service dated August 20, 1936, signed by Ernest Maehl he reported to work on August 24 as a laborer at 60 cents per hour. Mr. Maehl identified his signature (R. 129) on the assignment slip. He testified, however, that the rate of pay was wrong (R. 132) and he told Bob Barnard, superintendent for the defendant, that it should be 85 cents (R. 132) and that he got the 85 cents per hour (R. 132) This correction in wages was made on a re-classification slip of the National Reemployment Service admitted as defendant's Exhibit 3 without objection (R. 259). That slip was dated September 3, 1936, and Mr. Maehl's occupation was changed from laborer at 60 cents per hour to foreman at 85 cents per hour.

Mr. Maehl, according to his own testimony, went to work on the dam site August 24, 1936 (R. 121) in accordance with the assignment slip. He kept his own time book in his own handwriting (R. 123) and carried himself on the payroll beginning August 24, eight hours per day, and entered up his own time at 85 cents per hour during that week (defendant's Exhibit 1), the total amount paid him being $40.80 for 48 hours (R. 122, R. 124). He stated, "A. Only 80 cents an hour. That was what they agreed to give me as far as the clearing was concerned. That is, carried me on the payroll at that figure." Actually he carried himself at 85 cents per hour and the other men were paid 60 cents per hour (R. 125). From August 24 to September 11 he worked at the dam site and from September 11 until

November 9 he worked as foreman on camp construction (R. 128). On November 9 he became ill and left the job to return on December 28 (R. 136). From December 28 until January 15 he worked on the reservoir site at 85 cents per hour at which time he stated that the 118 acres had all been cleared.

He testified (R. 79; R. 80; R. 143 and R. 165) that Mr. Metcalf was the foreman while he was away but that he had never paid Mr. Metcalf personally, the latter having been paid by Barnard-Curtiss Company.

On January 18, 1937, three days after the 118 acres on the reservoir had been cleared, Ernest Maehl made a written contract with Barnard-Curtiss Company, defendant's Exhibit "A" attached to the answer (R. 30). This called for clearing 50 acres at the east end of the reservoir site and in no wise a part of the 118 acres hereinbefore referred to.

On his rebuttal the plaintiff stated that he cleared 24 acres of the 50 acres and partially cleared 12 acres (R. 334) and then was permitted over objection of counsel (R. 339) to state (R. 341) in support of his allegation in the reply (R. 36) that the written contract for clearing 50 acres was abandoned by mutual agreement when Mr. Stirckland, defendant's superintendent, told him that "We are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should have been done." He said Mr. Strickland explained (R. 341) that he had a lot of fellows that were supposed

to be truck drivers and Caterpillar drivers that he wanted to keep, and that he would like to take over and finish the clearing on account they wanted to hold them for other work, and that he answered (R. 341) "All right, if you pay us for the tools or return the tools to me you can take the job over in the morning."

Motion to strike the above evidence was denied (R. 341).

The record shows without contradiction the following:

1. Barnard-Curtiss Company paid for labor, clearing the 118 acres (Plaintiff's complaint) (R. 4) $8,360.30
2. Under the written contract while Maehl was clearing 24 acres and partially clearing 12 acres:
   a. For labor (R. 236) $4,301.30
   b. For Compensation insurance (R. 237) 193.18
   c. Feed and tools (R. 238) 55.48
   d. Horse rental (R. 238) 50.84
   e. Labor bond premium (R. 239) 43.00
   Total $4,779.84
3. After Maehl had cleared 24 acres and paritally cleared 12 under the 50-acre written contract Barnard-Curtiss took it over and completed the work at a total cost of ..... $6,862.85 (R. 241)

TOTAL $20,002.90

The total amount earned by Maehl for 118 acres at $100.00 per acre if he had a contract would have been $11,800.00 and the total amount for 24 acres under the written contract, $2,400.00 (R. 30), or a total of $13,-200.00.

The plaintiff Maehl dismissed his third cause of action with respect to furnishing stulls (R. 155). The fourth, fifth, sixth and seventh causes of action with respect to his wage claim and transportation of men and furnishing tools are of minor importance and will not be discussed in this brief.

On May 6, 1938, the complaint in this action was filed in the state court demanding a total on the seven causes of action in the amount of $5,572.75.

About July 20, 1938, C. A. Metcalf filed suit against the defendant, Barnard-Curtiss Company, demanding judgment against this defendant for clearing and grubbing 98.56 acres (R. 42-43). The amount of the demand in that suit was $2,990.00. On the same day Metcalf also filed suit in the state court (R. 48) for $410.00 on an alleged verbal contract for producing 6000 mine stulls.

C. A. Metcalf was called as a witness by the defendant, Barnard-Curtiss, in the Maehl case and after defendant, Barnard-Curtiss Company, had demonstrated that the witness C. A. Metcalf was an adverse witness (R. 280, R. 282) the court asked him if he was claiming for cutting the same timber that Mr. Maehl was claiming and the witness answered "Yes" (R. 282) as borne

out in the affidavit of J. A. Barnard on the motion for joinder of Metcalf (R. 52).

Thereupon the witness Metcalf testified in substance that he was present at the first conversation with Mr. Barnard at the reservoir site in 1935 (R. 276); that he and Maehl operating together made an agreement with respect to the clearing of the reservoir site (R. 284); that he was never Mr. Maehl's foreman (R. 284); that he carried out the work and was carried on the Barnard-Curtiss Company payroll (R. 284); that he had a contract with Barnard-Curtiss Company for the clearing (R. 286); and that he had sued Barnard-Curtiss Company for clearing practically the same area (R. 286); that the grubbing as alleged in Maehl's second cause of action was the same grubbing that he claimed a contract for (R. 288); that he had done all of the operating and that the original agreement was between Barnard-Curtiss Company and himself and Maehl (R. 282).

Barnard-Curtiss Company had filed its motion to join Metcalf as a third party defendant and that motion had been denied (R. 55).

At the conclusion of all of the evidence the defendant, Barnard-Curtiss Company, moved the court to direct a verdict in favor of the defendant and against the plaintiff for the reason that the plaintiff had failed to prove a contract for clearing the 118 acres referred to in his first cause of action or for grubbing the 20 acres referred to in the second cause of action upon the ground that no contract had been proven in the

original instance and that even if such a contract had been proven it was a contract between Maehl and Metcalf and not Maehl alone, and upon the further ground that even if a contract had been made with Maehl and Metcalf there was a fatal variance in the proof because Maehl had sued alone and not jointly with Metcalf (R. 353-354). The defendant further moved for a directed verdict on the sixth cause of action wherein the plaintiff Maehl claimed that he had earned $1.20 per hour upon the ground that there was no proof whatsoever to sustain a claim in the amount of $1.20 per hour and that the only creditable proof in the record was that he earned 85 cents per hour which he was paid (R. 354).

The motions were denied by the court (R. 355).

SPECIFICATION OF ERRORS TO BE URGED

The appellant will rely upon all of the points set forth in its statement of points (R. 374) excepting only point No. 1.

SUMMARY OF ARGUMENT

It is not thought that the argument can be satisfactorily summarized but the discussion will proceed upon the assignments of errors as they appear in the statement of points relied upon, beginning with point No. 2 (R. 374) and up to and including point No. 7 (R. 376).

ARGUMENT

It is not intended to prolong this argument beyond the point where a reasonable understanding of appellant's position may be had. Reduced to its simplest

terms the contention of the appellant is that Barnard-Curtiss Company, defendant below, appellant here, gave the Montana Water Conservation Board a bid to construct the Flint Creek dam in the summer of 1935. The construction of the dam involved a large amount of clearing on the reservoir site apparently somewhat in excess of 168 acres, of which 118 acres is involved in the action on the verbal contract and 50 acres involved on the written contract.

Mr. Barnard, in the fall of 1935, took C. A. Metcalf and Ernest Maehl out to the job and asked them what they would do the clearing for and they said they would do it for $100.00 per acre. The conversation was mostly with Maehl but directed at both of the parties. All through his direct examination Maehl referred to himself as taking the contract alone but on his cross examination as quoted heretofore in this brief he finally fully and frankly admitted that he and Metcalf were going in together on it and that was the intention of the two men at the time this agreement was made to go in together if they got the contract (R. 168). He admitted, however, that they never did go together to do the clearing (R. 169).

As it turned out, Barnard-Curtiss Company was not the low bidder for the project. However, the successful bidder refused to proceed with the work and when the project was re-advertised in 1936, Barnard-Curtiss Company was the successful bidder. When this evidence developed (R. 64) counsel for the defendant

moved to strike the evidence of the witness Maehl as not tending to prove the making of the contract alleged in the complaint (R. 64-65). Counsel for the plaintiff stated that the conversation was incorporated in a later conversation so the court let the testimony stand in the record. About June 23 or 24, 1936, as stated by Mr. Maehl (R. 66), Mr. Barnard came to him again and told him he was going to make another bid on the dam and wanted to know if he, Maehl, would stay with the agreements the same as he had made them before, and Maehl said he would (R. 66). Maehl was asked:

> "Q. Did you at that time refer to the conversation which you had previously had with Mr. Barnard?
>
> "A. Yes sir.
>
> "Q. And what was said in that connection?
>
> "A. Wasn't anything said. I just took it that we would go ahead."

The above statement was made on Mr. Maehl's direct examination and leaves no doubt but that if any contract was ever made it was made between Maehl and Metcalf as one of the parties and Barnard-Curtiss Company as the other party. This is all born out in the testimony of Metcalf. He was called as witness for the defendant and it was proven by the defendant that Metcalf was also suing for the same clearing on the same alleged contract and that he was therefore an adverse witness. Counsel demonstrated the adverse interest of Metcalf (R. 281) and the court gave counsel for the defendant the right to cross examine and ask leading questions (R. 282). The court asked Metcalf

if he was claiming against Barnard-Curtiss Company on the same contract for clearing the identical land or a part of it and Metcalf said he was (R. 282). In answer to a question asked by the court he said:

> "The Witness: I contend that I done all the operating, I done all the work; we had an agreement whereby we would do this work together, and I done all the work.
>
> "The Court: In other words your contention is that the agreement was between the defendant Barnard-Curtiss Company and you and Maehl?
>
> "The Witness: Originally, yes."

Metcalf stayed on the job all of the time and was paid weekly by Barnard-Curtiss Company (R. 284) at 75 cents per hour (R. 285).

He testified further (R. 285) that when Maehl came back from the hospital he told Maehl that Maehl had nothing to do with the work and that the men were informed that they were working for Metcalf and not Maehl and that the men agreed and went ahead and took their orders from Metcalf (R. 285).

There are two or three indisputable items in the evidence to which the court's attention is particularly called. The first of these is defendant's Exhibit 1 introduced on Maehl's cross examination. These exhibits were admitted without objection and are so completely inconsistent with the existence of a contract that they become extremely important, not only to prove that no contract existed but to prove that no performance of any kind ever took place under any alleged contract.

The first exhibit referred to was introduced without objection upon the testimony of Ernest Maehl on cross examination. It is the assignment slip given Maehl by the Works Progress Administration and it appears on page 130 and 131 of the transcript. It is the usual assignment slip and it was signed by Ernest Maehl personally. It gave the name, identification number, address and the date, August 20, 1936. It stated that the person named would report ready for work at 8:00 A. M. on August 24, 1936, as a laborer at 60 cents per hour on the Barnard-Curtiss dam project in Granite County, giving R. W. Barnard as the name of the foreman or supervisor. It bore the certificate of Ernest Maehl saying that he was the person named as the employee. This assignment slip as so signed by Ernest Maehl and admitted in evidence on his testimony is completely inconsistent with the existence of any contract.

If the assignment slip itself could be explained away it still must be borne in mind that Maehl objected to the rate of pay and told Mr. Barnard that the pay should have been 85 cents per hour (R. 132). The rate of pay was changed and Maehl was paid 85 cents per hour (R. 132) upon the basis of a reclassification slip (Defendant's Exhibit 3) (R. 259) correcting the rate of pay and classifying Maehl as a foreman. The reclassification slip was signed by Mr. Barnard.

Furthermore, even if some reasonable explanation could be given by Maehl for the assignment slip and

reclassification slip it seems impossible to credit his statement that he had a contract in view of the fact that he proceeded to carry himself in his own time book (Defendant's Exhibit 1) (R. 122) at eight hours per day at 85 cents per hour. He started to work on the damsite on August 24, 1936, as a forman on the very day indicated in the assignment slip (R. 130) which was later corrected by the reclassification slip (R. 259). Maehl kept that time book in his own handwriting in the usual course of the business of Barnard-Curtiss Company and in the manner required of their foremen (R. 123).

There are two exhibits which appear in the record as Defendant's Exhibits 4 (R. 176) and 5 (R. 177) which were in the time book but have no bearing on Barnard-Curtiss Company work. They are time sheets kept on a separate contract wherein Clifton-Applegate Company were the contractors. However, Defendant's Exhibit 6 (R. 178) again shows E. Maehl as having gone to work on camp construction September 11, 1936, as testified to by him. He also worked on the camp during October, (Defendant's Exhibit 7) (R. 179) and finally became ill and stopped work November 9, 1936 (Defendant's Exhibit 9) (R. 181).

So we have Mr. Maehl performing all the way through under his own signature as a foreman at 85 cents per hour and there is no scintilla of evidence that he claimed that he was under contract during that period.

JOINDER OF METCALF AS A THIRD PARTY

QUESTION 1

Assuming that Barnard-Curtiss Company made a verbal contract in 1935, which is not admitted by appellant, it is clear from the testimony of Maehl himself and of Mr. Metcalf that such contract was made between them operating together as parties and Barnard-Curtiss as the other party. This is borne out by the statement of Metcalf that he was claiming under the same contract as Maehl and that he had sued Barnard-Curtiss Company separately in the state court under the same alleged contract. The motion for joinder (R. 38) was based upon the Maehl complaint in this action and upon the two complaints of Metcalf pending in the state court in Granite County, Montana (R. 42 and R. 48). The motion is further based upon the affidavit of J. A. Barnard setting forth the facts as to the conflcting claims of Maehl and Metcalf.

The motion was made under Rule 14 (a) and Rule 22 (1). Rule 22(1) of the Rules of Civil Procedure for the District Courts, Act of June 19, 1934, Chapter 651, reads as follows:

> "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims do not have a common origin or are not identical but are adverse of the several claimants or the titles on which their claims depend to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part

> to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20."

In the case of *Standard Surety & Casualty Co. of New York vs. Baker,* (U. S. C. C. A. 8th Cir.) 105 Fed. (2d) 578, the plaintiff bonding company had given a bond to guarantee that A. B. Collins and Company, a Missouri corporation, as a dealer in securities would comply with the provisions of the Missouri statute regulating such dealers. A. B. Collins and Company were adjudged bankrupt and thereafter numerous demands were made upon the bonding company. Several actions were pending in the state court of Jackson County and one had been commenced in the United States District Court, Western District of Missouri. Other claimants had filed claims against the Trustee in Bankruptcy. The plaintiff bonding company alleged that its liability was limited to $5000.00 but that the aggregate amount sued for was in excess of $20,000.00. Furthermore the plaintiff did not know to whom it might be obligated and in what amounts, if any.

In considering the applicability of Rule 22(1) and its relationship to the Federal interpleader statutes the court sustained the bill in the following language:

> "It may finally be determined that one or two only are entitled to recover, yet judgments might be procured on many of these claims simultaneously if defendants may proceed to the prosecution of

their various suits. There might not be opportunity to plead by way of amendment or supplemental answer, the recovery of a prior judgment against plaintiff on the same bond. Again, courts might not permit such a defense because, perchance, the courts might hold that satisfaction and adjudication of liability alone would satisfy the requirements of the bond. After recovery of judgments, execution might issue on all, and plaintiff might find it impossible to set aside final judgments. Even if it be assumed that the first to recover judgments or to issue execution should first be paid until the liability on the bond was exhausted, subsequent claimants in order of recovery might insist that the penalty should be apportioned (Thomas Laughlin Co. v. American Surety Co., supra), and liability on that ground might be asserted. In these circumstances there is a real threat of liability, and it was to meet such a situation that the interpleader statutes were adopted. As said in Metropolitan Life Insurance Co. v. Hamilton, N. J. Ch., 70 A. 677, 679, '* * * claims prosecuted in this way under the solemn sanction of legal proceedings in the courts are claims which the complainant has a right to regard as hazardous to its financial interests'."

It may be urged by the appellee in this case that interpleader or joinder of a third person may not be used as a means of ousting the state court of its jurisdiction but it will be noted that in the above case injunctions were granted restraining the prosecution of actions in the state and Federal courts until a trial of the interpleader suit.

In *Century Insurance Co., Limited, vs. First National Bank of Hughes Springs,* 102 Fed. (2d) 726, wherein claims against a bankrupt bonded warehouse

brought several actions to recover the proceeds of a fire insurance policy the court held that, even though the action was commenced prior to the passage of Rule 22, that the rule had had the effect of broadening the scope of interpleader and that upon retrial the liberal provisions under the rule should be made applicable.

Furthermore the Rules of Civil Procedure are entirely consistent with the practice in Montana. In *Security State Bank of Roy vs. Melchert,* 67 Mont. 355, the bank instituted a suit against Melchert for monies due the bank. O'Brien had assigned his estimate to the bank and there was a dispute as to the amount owed from Melchert to O'Brien. Other creditors had sued O'Brien and attached the money in Melchert's hands and Melchert sought to interplead all of the parties.

The court held that it was not necessary that Melchert admit that he owed O'Brien the full amount claimed but that he could in fact deny that he owed that amount and resist the claim and at the same time maintain the right to the joinder of the other creditors.

The Montana Statute involved is now section 9151, Revised Codes of 1935, containing language very similar to that in the Rules of Civil Procedure. The court said in part:

> "Manifestly it was the intention of our legislative assembly in enacting this statute to broaden the rule which obtained under the ancient chancery practice, by permitting additional parties interested in the subject matter of the action to be brought in, to the end that a complete adjudication of all their rights may be had in the one action. This

statute supplements the interpleader statute by providing for a class of cases not comprehended by that section."

The language used in the Montana case just above cited is very similar to that used in the Federal Courts in the construction of these rules.

In *Morrell vs. United Air Lines, et al,* (D.C. N.Y.) 29 Fed. Supp. 757, plaintiff sued United Air Lines for damages for the death of a passenger on a plane which crashed alleging a defective cylinder in the motor as negligence. Defendant United Air Lines was given leave to join United Aircraft Corporation and Bethlehem Steel Company as third parties under Rule 14 alleging that they were the manufacturers of the defective cylinder. The third party complaints were sustained notwithstanding the failure of the defendant to allege jurisdictional facts and its was held that the third party defendants were properly brought into the action.

In *Burris vs. American Chicle Co.* (D.C. N.Y.) 29 Fed. Supp. 773, plaintiff sued for personal injuries alleging violation of the safety device law as negligence. The plaintiff was injured while cleaning windows on a building belonging to defendant. Defendant sought to have the Ashland Window and House Cleaning Co. brought in as a third party because it was claimed that the latter company had a contract for cleaning the windows and if there was any negligence it was that of the third party and not that of the defendant. It was held that Rule 14 applied and the defendant was permitted

to bring in the Ashland Window and House Cleaning Co.

Again in *Kravas, et al, vs. Great Atlantic & Pacific Tea Co.,* (D.C. Pa.) 28 Fed. Supp. 66, an action by plaintiff and her husband against the tea company to recover damages for personal injuries, the defendant sought to bring in Joseph Davis as the owner of the property in front of which the plaintiff was injured and against the Peoples-Pittsburgh Trust Company as a mortgagee in possession of said building. The question raised there was jurisdictional in that the third party defendants were residents of Pennsylvania and there was no diversity of citizenship but the court held to the rule that since it had jurisdiction in the original action the jurisdictional requirements were met with respect to the third party complaints.

The court further held that it was no objection to the third party complaints that the alleged claim of liability of the third party defendants arose out of a contract separate and distinct from the cause of action forming the basis of plaintiff's suit. The court said:

> "We see no merit in this contention, because the rule permits a defendant to bring in a third party, 'who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him.' "

One of the late cases is *Gray vs. Hartford Accident and Indemnity Co.,* 31 Fed. Supp. 299. In the latter case the jurisdictional question was again raised and overruled and after having disposed of that question in

conformity with the cases hereinbefore cited and many others to the same effect, the court said:

> "In the study of objections made, we must consider that Rule 14 has for its well-accepted purpose the bringing of third parties 'so that the right of all persons concerned in a controversy might be adjudicated in one proceeding.' "

The cases just cited are not essentially different from the case at bar. In the case at bar the motion was for leave to join Metcalf as a defendant since Metcalf was claiming the same fund under the same alleged contract there could be no determination of the rights of Barnard-Curtiss Company without the joinder of Metcalf. Certainly if Maehl could obtain a final judgment in the Federal Court notwithstanding Barnard-Curtiss Company's denial of the making of the contract, it would be reasonable to expect that Metcalf would recover in the state court on the same claim and there is no known procedure by which an execution could be stayed out of the Federal Court pending litigation in the state court, or by which payment of a judgment in the Federal Court to Maehl could be offset against a judgment in the state court in favor of Metcalf.

It ought to be obvious that Barnard-Curtiss Company is given the right by either Rule 14 or Rule 22 to resist both claims in the same jurisdiction and that an inexcusable injustice would be done if it is denied that right.

QUESTIONS 2, 3, 4.

The second, third and fourth questions presented are

as to whether the plaintiff, Ernest Maehl, made sufficient proof of a verbal contract between him and the defendant, Barnard-Curtiss Company, for the clearing and grubbing referred to in the first and second causes of action.

The appellant is not relying in this appeal on any of the evidence offered by its witnesses but is discussing only the uncontradicted evidence of the plaintiff in connection with his allegation that a contract was made between him and the defendant for the clearing and grubbing in the first and second causes of action (R. 2 and R. 4) and the wages claimed in the sixth cause of action (R. 11).

The uncontradicted evidence given by the plaintiff himself is that he and Metcalf went with the two Barnard's to the site of the dam (R. 167) and that J. A. Barnard, directing his remark at Maehl, asked what they would do the clearing for. Mr. Maehl said $100.00 per acre, but as heretofore quoted from the evidence he said that he and Metcalf were going together if they got the contract and that the conversation in 1935 was all with respect to Maehl and Metcalf getting together and taking the clearing together. On his direct examination (R. 64) he had said that Barnard-Curtiss Company did not get the contract from the Montana Water Board at that time and counsel for the defendant moved to strike the testimony as not tending to prove the making of the contract as alleged in the complaint, that contract having been alleged to have been made

in July of 1936, a year later. Thereupon counsel for the plaintiff Maehl said that he would offer evidence to show that the conversation of 1935 was incorporated in a later conversation (R. 65). This statement of counsel brought out the proof that Jim Barnard spoke to Mr. Maehl in the fall of 1936 and said he was going to make another bid on the dam and wanted to know if Maehl would stand by his agreements *"same as I made before and I told him I would . . . ."* (R. 66). Counsel then asked him if anything had been said in 1936 with reference to the conversation previously had and in answer to that Maehl said there was such a conversation, and when asked what was said he answered: "A. *Wasn't anything said. I just took it that we would go ahead"* (R. 67).

Later on cross examination it devoleped that when he said we would go ahead he was referring to himself and Metcalf (R. 168-169).

So the uncontradicted facts, based on Maehl's own testimony, and supported by Metcalf who had sued in the state court on the same alleged contract and who was an adverse witness to the defendant (R. 282), are entirely clear that if any contract was made at all it had its inception in 1935 in an agreement to which both Maehl and Metcalf were the first parties. That agreement could not have been binding because Barnard-Curtiss Company failed to get the contract and everything was dependent upon that. Then when Barnard-

Curtiss Company got the contract in 1936 Maehl agreed to stand by the promise made in 1935.

The defendant, appellant here, is therefore confronted by the question as to whether or not in a case where two parties agree to do a clearing job, even though defendant may have accepted the agreement, one of those parties could later sue upon the theory that the contract was made by him alone.

This involves fundamental principles of contract and under the decision in the case of *Erie Railroad Company vs. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, the Montana statutes and court decisions are controlling.

Section 7473, Revised Codes of Montana, 1935, reads as follows:

> "*Essentials of consent.* The consent of the parties to a contract must be:
> "1. Free;
> "2. Mutual; and,
> "3. Communicated by each to the other."

Section 7488, Revised Codes of Montana, 1935, provides:

> "*Mutuality of consent.* Consent is not mutual, unless the parties all agree upon the same thing in the same sense."

Section 7493, Revised Codes of Montana, 1935, provides:

> "*Acceptance must be absolute.* An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

Section 7527, Revised Codes of Montana, 1935, provides:

> "*Contracts—how to be interpreted.* A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Section 7539, Revised Codes of Montana, 1935, provides:

> "*Contract restricted to its evident object.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

It is unquestionably the law that before a contract comes into existence there must have been a meeting of the minds between the parties and upon the subject matter. It so happens that no Montana case has been found in which one party has attempted to collect upon a contract made by him jointly with another but the Montana Supreme Court has passed in numerour cases upon the general subject of the making of a contract. One of the cases referred to is *State ex rel Henderson vs. Board of State Prison Commissioners,* 37 Mont. 378, 96 Pac. 736. In that case the Board of Prison Commissioners advertised the letting of a contract for the care of the prisoners. In the advertisement there were numerous conditions some lawful and others unlawful and the plaintiff Henderson offered a bid which was at variance with the terms contained in the notice to bidders. The contract was not awarded to Henderson and he brought a mandamus action, somewhat in the nature of a suit for specific perform-

ance, to compel the Board of Prison Commissioners to award the contract to him. The court said:

> "The plaintiffs in this case were the offerors. They offered to care for the inmates of the state prison at thirty-nine cents *per capita* per day, and, in addition thereto, to 'guarantee' the state against certain supposed existing liabilities, under such rules and regulatons as the state board should prescribe. The board replied, in effect: 'Very well, we will declare you the lowest and best bidder and award the contract to you, provided you will "guarantee" the state by doing certain things (setting forth the things to be done.)'
>
> " 'An acceptance to be effectual must be identical with the offer and unconditional. Where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is a counter-proposal and in neither case is there an agreement.' (9 Cyc. 267.) In the case of Bruner v. Wheaton, 46 Mo. 363, the court said: 'In order that an acceptance may be operative, it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay. To constitute a valid contract there must be a mutual assent of the parties thereto; and they must assent to the same thing in the same sense. Therefore an absolute acceptance of a proposal, coupled with an qualification or condition, will not be regarded as a complete contract, because there at no time exists the prerequisite mutual assent to the same thing in the same sense.'
>
> "In the case of Egger v. Nesbitt, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385, it was held that where one offers by letter to make a quitclaim deed for a named price and the person receiving

the letter accepts the offer on condition that other deeds are turned over to him, there was no binding contract.

"In the case of Corcoran v. White, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525, it was said: 'In order (that a contract of sale should result), there should have been an unconditional acceptance of (the) offer. There was but a conditional acceptance—one upon the condition that the title was perfect.'

"In the case of Harris v. Scott, 67 N. H. 437, 32 Atl. 770, it was held that plaintiff's reply to the defendant's offer of certain stock at a specified price that he would pay the price if the defendant had actually received a similar offer from others, as stated in her letter, and would give him their names, was a rejection of the defendant's offer and a new proposal. The court said: 'No contract for the sale of the shares to the plaintiff was completed. His acceptance of Mrs. Scott's offer was conditional. Their minds did not meet.' (See, also, Northam v. Gordon, 46 Cal. 582; Page on Contracts, sec. 47.)

"Treating the case as though plaintiffs' bid contained but one offer—that is, that they would care for the prisoners at thirty-nine cents per head per day, and that the counter-proposition that plaintiffs should also indemnify the state was first proposed by the board—there was no contract, for the reason that the counter-proposition was not accepted by the plaintiffs. And it makes no difference whether or not the board had authority to impose the additional terms, because the record shows that the board never intended to award the contract unconditionally, and the minds of the parties never met on that point. Indeed, the record shows that the plaintiffs never believed that the board had accepted the bid unconditionally. There is no contract unless the parties thereto assent; and they must assent to the same thing

in the same sense. It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition. (Spinney v. Downing, 108 Cal. 666, 41 Pac. 797). Mr. Page in his work on Contracts (section 42) uses this language: 'An intention to accept the terms of the offer as valid is ordinarily an essential element of a valid acceptance.' He cites the following cases in support of the text, viz.: Regan v. Regan, 192 Ill. 589, 61 N. E. 842, Holmes v. Holmes, 129 Mich. 412, 95 Am. St. Rep. 444, 89 N. W. 47, Fuller Co. v. Houseman, 114 Mich. 275, 72 N. W. 187, and Hanson v. Nelson, 82 Minn. 220, 84 N. W. 742, in all of which importance is attached to the intention of the party who was alleged to have made the contract. This case is much stronger than any of those just cited, as the record of the proceedings of the defendant board shows that the intention was not to declare the plaintiffs the lowest and best bidders, unless the condition subsequent was complied with. And the plaintiffs are not in position to claim that the board awarded them the contract stripped of all conditions, because it is manifest that the offer to 'guarantee' the state, made by them, was the inducement which led the board to make its finding."

In the case of *J. Neils Lumber Company vs. Farmers Lumber Company,* 88 Mont. 392, 293 Pac. 288, the facts were quite different from those in the case at bar but the court laid down the general principle in the following language:

"As a matter of law, the consent of parties to a contract must be mutual (sec. 7473, Rev. Codes 1921), and 'consent is not mutual, unless the parties all agree upon the same thing in the same sense.' (Sec. 7488, Id.) But this is subject to the exception stated in section 7488 that 'in certain

cases defined by the chapter on interpretation, they are to be deemed so to agree without regard to the fact.' "

To the same effect is the rule laid down in *Beale vs. Lingquist,* 92 Mont. 480, 15 Pac. (2d) 927:

> "It is elementary that, in order to effect a contract, there must be an offer by one party and an unconditional acceptance of it, according to its terms, by the other. (Glenn v. S. Birch & Sons Const. Co., 52 Mont. 414, 158 Pac. 834; Polich v. Severson, 68 Mont. 225, 216 Pac. 785; J. Neils Lumber Co. v. Farmers' Lumber Co., 88 Mont. 392, 293 Pac. 288; 13 C. J. 279.)"

The same rule is affirmed in *Montana-Dakota Power Co. vs. Johnson,* 95 Mont. 16, 23 Pac. (2d) 956, wherein it is said:

> "The undisclosed intention of the bank originally to treat the funds as held on special deposit, if the facts related would justify a finding that such was the result of the bank's action for a time, does not aid the plaintiff, as the mutual assent essential to the formation of a contract must be gathered from their outward expressions and acts, not those undisclosed. (Washington Shoe Co. v. Duke, 126 Wash. 510, 218 Pac. 232, 37 A. L. R. 611.)"

In view of the absence of a decision of the Montana court directly on the point appellant has made a search for authorities outside which are in conformity with the general principle announced in Montana. The Restatement of the Law of Contracts contains the following:

> "Section 129. An action to enforce a joint right under a contract must be brought by or in the name of all surviving obligees."

Williston on Contracts (Revised Edition, 1937) contains the following in section 80, page 231 of Volume I:

> "One of the necessary terms of any proposed contract is the person with whom the contract is to be made. Accordingly an offer made to one person cannot be accepted by another, even though the offeree purports to assign it. Nor does it make any difference whether it was important for the offeror to contract with one person rather than another. . . ."

Section 95, page 301, Volume I, Williston on Contracts:

> ". . . If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance.
>
> "Such an error in language may relate to the object to which the apparent agreement relates, to the person with whom it was made, or to any of its terms."

Corpus Juris Secundum, Section 28, Volume 17 (Contracts), reads as follows:

> "It is necessary to the validity of a written contract that the contracting parties be described, and the rules of certainty applicable to other essentials of the contract, ... are applicable to the specification and determinability of the parties thereto. It is of the essence of a contractual obligation that it be due to some particular person as distinguished from the general public, and a promise by an indefinite and unidentified number of persons to do a particular thing jointly cannot be enforced, as the promisee will not be permitted to proceed against selected persons to compel them to do by themselves what they have only promised to assist others in doing."

Section 40, Corpus Juris Secundum, Volume 17 (Contracts):

> "When an offer is made to a particular person it can be accepted by him alone, and is not transferable by him to another; nor can it be accepted by such other without the offeror's consent."

American Jurisprudence, Section 38, Volume 12:

> "An offer can be accepted only by the offeree. To constitute a valid contract, the minds of the parties must have met on the identity of the persons with whom they are dealing. Everyone has a right to select and determine with whom he will contract and another cannot be thrust upon him without his consent. It is immaterial whether the offeror had special reasons for contracting with the offeree rather than with someone else.
>
> "It is said that the consent of all persons having an interest in an option is necessary to its exercise by any one of them."

These principles of law were announced by the United States District Court for the District of Montana in *Schwartz vs. Inspiration Gold Mining Co.,* 15 Fed. Supp. 1030, at page 1037:

> "It is elementary that to constitute a contract the minds of the parties must have met upon the same thing at the same time; or, stated differently, a contract results from an offer by one party in form which may be accepted, and its unqualified acceptance by the other. Polich v. Severson, 68 Mont. 225, 216 P. 785; J. Neils Lumber Co. v. Farmers' Lumber Co., 88 Mont. 392, 397, 293 P. 288. The law is also too well settled to admit a doubt that, in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be acertained to a reasonable degree of certainty what they mean. And, if an agreement be so vague and indefinite

that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law, section 7501, Rev. Codes Mont. 1921; Price v. Stipek, 39 Mont. 426, 431, 104 P. 195; Schwab v. McVey, 54 Mont. 422, 425, 171 P. 277; Thrasher v. Schreiber, 77 Mont. 221, 227, 250 P. 600; Evankovich v. Howard Pierce, Inc., 91 Mont. 344, 351, 8 P. (2d) 653; and, in order to form a contract, there must be an offer by one party and an unconditional acceptance of it by the other in accordance with its terms. And, if the acceptance falls within or goes beyond the offer or makes a condition at variance with the proposal, there is no contract, and the transaction amounts to one of proposals and counter proposals only. J. Neils Lumber Company v. Farmers' Lumber Company, 88 Mont. 392, 397, 293 P. 288, and cases there cited."

The general rules of law announced in the Montana cases have been repeatedly approved in other jurisdictions and in the absence of a Montana case upon the subject of the right of a party to a contract to insist upon an accurate agreement or understanding as to the other parties thereto, we submit a number of cases, all of which are in agreement upon the subject and as above stated, in harmony with the general rule in Montana. One of the leading cases upon the subject and a case in which a very thorough statement is contained is the case of *School Sisters of Notre Dame vs. Kusnitt* (Md.), 93 Atl. 928. That was a case in which the Sisters of Notre Dame, operating a hospital, contracted to purchase certain

rubber goods from Goodyear Hospital Rubber Company. Joseph S. Holstein appeared at the hospital and represented himself to be an officer in the corporation which he referred to as Goodyear Hospital Rubber Company. The facts disclosed that the Sisters thought they were dealing with a bona fide corporation and apparently placed a good deal of reliance on the name "Goodyear." The Sister Superior, however, by reason of the conduct of Holstein, immediately concluded that there was some misrepresentation or misunderstanding as to the nature of the representations made by Holstein and upon investigation learned that there was no such company and that apparently Holstein was the representative of one Kusnitt, an individual trader. The goods were rejected upon delivery and Kusnitt sued. The statement of the court is quite lengthy but the court of appeals of the State of Maryland summed up the facts as follows and in view of the thorough consideration given this question by the Maryland court we quote at length from the decision in that case:

> "The evidence to which we have referred at some length shows conclusively that the Sisters who made the contract in this case on behalf of the defendant thought they were contracting with and intended to contract with a company or corporation which owned a large factory in or just outside of Hartford, Conn., and employed a great number of men engaged in the manufacture of goods of the character mentioned in the contract; and it also shows that they were led to so believe by the statements and representations of the wit-

ness Holstein. It is true he denies that he said that the Goodyear Hospital Rubber Company was a corporation, but he admits that he told them that he represented a company of that name, and does not deny that he told them that the company had a factory just outside of Hartford where it employed a number of men in manufacturing goods of the kind he offered to sell, and that he was willing to give them the goods mentioned at a reduced rate in order to keep its men employed during the winter season; that there was in fact no such corporation, company or factory, and that the Sisters who represented the defendant in the negotiations never knew or heard of the plaintiff in this case until the suit was brought, and never intended to contract with him must be conceded.

"In Anson on Contracts (11th Ed.) section 184, the learned author, in speaking of 'mistake as to the identity of the person with whom the contract is made,' refers to the cases of Boulton v. Jones, 2 H. & N. 564, and Cundy v. Lindsay, 3 App. Cas. 459, as follows:

" 'In Boulton v. Jones, Boulton had taken over the business of one Brocklehurst, with whom Jones had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst. Boulton supplied them without any notice that the business had changed hands. When Jones learned that the goods had not come from Brocklehurst, he refused to pay for them, and it was held that he need not pay. "In order to entitle the plaintiff to recover, he must show that there was a contract with himself." In Cundy v. Lindsay, a person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron, induced A. B. to supply him with goods which he afterwards sold to X. It was held that an innocent purchaser could acquire no right to the goods, because as between A. B. and Blenkarn there was

no contract. "Of him," says Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no concensus of mind, which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides should be required." The result of the two cases is no more than this: That if a man accepts an offer which is plainly meant for another, or if he becomes party to a contract by falsely representing himself to be another, the contract in either case is void. In the first case one party takes advantage of the mistake, in the other he creates it.'

"In note 2 to page 169 it is said:

" 'The same result follows if the seller is induced to contract with B. on his representation that he is acting as agent for a named person.'

"Mr. Benjamin, in his work on Sales of Personal Property (3d Ed.) section 74, after reviewing the English and American cases says:

" 'Where a person passes himself off for another, or falsely represents himself as agent for another, for whom he professes to buy, and thus obtains the vendor's assent to a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him.'

"He then refers to certain cases where the contracts were held void, on the ground of fraud, and says, 'But they were equally void for mistake.' Mr. Brantley, in the Second Edition of his work on Contracts, says:

" 'It is well settled that if a man falsely represents that he is the agent of another, and thus obtains possession of property, there is no sale, and

the transaction is void. In this instance the seller intends to contract, not with the person before him, but with a prinicpal, who is either nonexistent or has not authorized the contract. There is consequently no meeting of minds between the seller and buyer. The offer or declaration of will by the seller is not met by a corresponding will on the part of any buyer, and the offer to sell, not being made to the party present, cannot be accepted by him.'

"He says also:

" 'That, where goods are ordered of one person and supplied by another, the latter has no claim against the purchaser ex contractu, unless he appropriates them after notice of the substitution, in which case he assents to the change.'

"The same rule is expressed in 9 Cyc. 401, 402, as follows:

" 'Mistake as to the identity of the other party arises where a person contracts with another believing him to be the one with whom he intends to contract, while, as a matter of fact, it is another person. Here, whether the mistake arises through the other's fraud, as when he falsely represents himself to be another, or accepts an offer which is meant for another, there is no agreement. One who enters into an agreement has a right to know with whom he is agreeing; and, when a person intends to contract with another, he cannot be compelled to accept a third person as the other party to the contract.'

"In Humble v. Hunter, 12 Ad. & El. 310, Lord Denman announced the rule in the statement:

" 'You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract.'

"And in Arkansas Co. v. Belden Co., 127 U. S. 379, on page 387, 8 Sup. Co. 1308, on page 1309 (32 L. Ed. 246), the Supreme Court says:

" 'But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." '

"In the case of Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9, the court said:

" 'To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and, upon the facts stated, no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterwards delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought the business of the Citizens' Ice Company, until after the delivery and consumption of the ice. . . . There was no privity of contract established between the plaintiff and defendant, and, without such privity, the possession and use of the property will not support an implied assumpsit. Hills v. Snells, 104 Mass. 173 (6 Am. Rep. 216). And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff. * * * A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. * * * In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. * * * If he had received notice and continued to

take the ice as delivered, a contract would be implied.'

"In the case of Edmunds v. Merchants' Transportation Co., 135 Mass. 283, 'the swindler introduced himself as the brother of Edward Pape of Dayton, Ohio, * * * the plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape,' and the court held that there was no contract with him, because the swindler who acted as his agent had no authority, and that there was no contract of sale made with any one, and that the relation of vendor and vendee never existed between the plaintiffs and the swindler.

"In the case of Rodliff v. Dalinger, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439, wool was delivered to a broker with the understanding that it was sold to an undisclosed manufacturer. It turned out that the broker in fact was not acting for the undisclosed principal, and the court held that there was no contract of sale.

"In the case of Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367, where the goods ordered by one person were supplied by another, the Supreme Court of Indiana held that the acceptance and use of the goods, without notice that they were so supplied, would not warrant a recovery because 'one of the indispensable elements of a contract—the mutual assent of the contracting parties'— was absent, and that, to support a recovery for goods sold and delivered, there must be a contract, either express or implied, between the person who ordered and the one who supplied the goods.

"The cases of Roof v. Morrisson, Plummer Co., 37 Ill. App. 37, Consumers' Ice Co. v. Webster, etc., Co., 32 App. Div. 592, 53 N. Y. Supp. 56, and Randolph Iron Co., v. Elliott, 34 N J.. Law, 187, are to the same effect.

"In this state the case of Fifer v. Clearfield Coal Co., 103 Md. 1, 62 Atl. 1122, is directly in point.

There the contract was made in the name of the Cambria Coal Company by one who represented that he was the agent of the company. The defendant was led to believe and thought that the Cambria Coal Company was a corporation. The evidence disclosed that there was no such corporation, and that the agent in fact represented the plaintiff, Clarence A. Fifer, who was trading as the Cambria Coal Company. In disposing of the case, Judge Page, speaking for this court, said:

" 'The testimony shows that the contract entered into by the appellee was with the Cambria Coal Company, which, so far as the record discloses, was a fiction, not representing any corporation or association. It is clear, from all the evidence, that the appellee and its agents, during the whole time the negotiations for the sale of the coal were going on, thought they were dealing with a corporation.'

"After referring to some of the evidence in the case, he said further:

" 'It is therefore clear that the appellee supposed it was dealing with a corporation and not with an individual; and, furthermore, the evidence will show that this belief on its part was induced by the conduct of Deitrich, the agent of the appellant. The law applicable to such a state of facts is thus stated in Anson on Contracts, p. 163 (8th Ed.) Mistakes as to the indentity of the person with whom the contract is made "arise where A. contracts with X., believing him to be M.; that is, where the offeror has in contemplation a definite person with whom he intends to contract." The author cites, in support of this position, the cases of Boulton v. Jones, 2 H. & N. 564; Cundy v. Lindsay, 2 App. Cases, 459. In the latter case, where "a person named Blenkarn, imitated the signature of a respectable firm named Blenkiron, induced A. B. to supply him with goods which he afterwards sold to X. It was held an innocent pur-

chaser could acquire no right to the goods, because as between A. B. and Blenkarn there was no contract.'' '

"After quoting the statement of Lord Cairns in that case, and citing the case of Roof v. Morrisson, Plummer Co., supra, this court further said:

" 'The author in a note adds: These cases must be distinguished from those where B. deals with A., supposing A. to be acting for himself, when in fact A. is acting for an undisclosed principal X. Applying these principles to the undisputed evidence in the case, it seems that the appellee was led to suppose that it was dealing with a corporation. * * * It did not intend to contract with an individual, and was misled by Deitrich in so doing. There was therefore no valid contract between the appellee and the appellant, and the latter cannot maintain this suit.' "

A similar case was decided in the court of appeals in the state of New York in *Paige vs. Faure,* 127 N. E. 898. In that case Faure, a dealer in automobile tires entered into a contract with Paige and one Lindner giving them the exclusive agency in the United States with the exception of certain areas to sell automobile tires bearing his name. Paige and Lindner proceeded with performance for a period of time and Lindner sold his interest in the contract to Paige who continued to perform for a period of time. The contract contained a provision for renewal and at the expiration of the period of the original contract Paige gave notice of his intention to request a renewal for a period of a year. Faure refused and thereupon was sued by Paige who was given a verdict against Faure. On appeal the decision was reversed and the appellate court said:

"There was no provision in the contract to the

effect that Paige and Lindner were to devote their time and use their best endeavors to further the interest of Faure, or in fact to do anything except to purchase $1,000 worth of tires and pay him for goods sold by them, whether from consigned stock or that purchased outright, on or before the 20th of the month following the date of sale. In view, however, of the credit and the exclusive agency given to them, it is fairly to be implied that they were to devote their time and do whatever was reasonable and necessary to selling the plaintiff's product. The contract meant something. It was not a mere scrap of paper. The owner of a product would not give to another the exclusive agency, covering a wide territory, to sell the same unless he believed an effort would be made by the one to whom such right was given to sell; and one would not take, if acting in good faith, an exclusive agency to sell another's goods unless he expected and intended to use reasonable efforts to sell. Wood v. Duff-Gordon, 222 N. Y. 88, 118 N. E. 214; City of New York v. Paoli, 202 N. Y. 18, 94 N. E. 1077; Wilson v. Mechanical Orguinette Co., 170 N. Y. 542, 63 N. E. 550; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. Faure, during the life of the contract, could not sell his own goods, except in the territory reserved. The acceptance by Paige and Lindner of benefits under the contract imposed upon them a corresponding obligation for Faure's benefit. Wood v. Duff-Gordon, supra; Taylor Co. v. Bannerman, 120 Wis. 189, 97 N. W. 918; Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N. W. 319. Unless this be so, then the transaction could not have the business efficacy which both parties must have intended it should have when the contract was executed.

"This naturally leads to the only other question presented by the appeal, and that is whether the

contract was assignable without Faure's consent; in other words, did Lindner's assignment to Paige of all his interest in the contract justify Faure in refusing, at the request of Paige, to renew the contract for another year? I am of the opinion that it did. Faure entered into a contract, not with Paige, but with Paige and Lindner. He was to have the benefit of the services of both, not one, in the sale of his product. He agreed to give credit to both, not one, and it may very well be, except for Lindner, he would not have executed the contract at all.

"The general rule is that rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relationship of personal credit and confidence. Nassau Hotel Co. v. Barnett & Barse Corp., 162 App. Div. 381, 147 N. Y. Supp. 283, affirmed, on opinion below, 212 N. Y. 568, 106 N. E. 1036; Wooster v. Crane & Co., 73 N. J. Eq. 22, 66 Atl. 1093; Hardy Implement Co. v. South Bend Iron Works, 129 Mo. 222, 31 S. W. 599; Montgomery v. De Picot, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84; Puffer v. Welch, 144 Wis. 506, 129 N. W. 525; Pollock on Contracts (4th Ed.) 425.

"No bilateral contract for personal services can be assigned by either party to it, without the consent of the other. Williston on Contracts, section 421. But it is urged that this case does not fall within the general rule, because there is a provision in the contract that 'This agreement shall bind and benefit the respective successors and assigns of the parties hereto.' When the whole contract is considered, I am of the opinion this did not give Lindner the right, without Faure's consent, to assign his interest to Paige. The intention of parties to a contract must be ascertained, not from one provision, but from the entire instrument. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022;

Herryford v. Davis, 102 U. S. 235. 26 L. Ed. 160. When this contract is thus considered, it is apparent that both Paige and Lindner were personally to devote their time to carrying out its terms. This necessarily follows from the language used, which shows that a personal trust and confidence were reposed in both of them. Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.

"In Nassau Hotel Co v. Barnett & Barse Corp., supra, the plaintiff owned a hotel and entered into an agreement with two men by the names of Barnett and Barse to conduct it for a period of years. Thereafter they formed a corporation and assigned the contract to it. The court held that as the contract involved a relation of trust and confidence, and as a party has the right to the benefit contemplated from the character, credit, and substance of him with whom he contracts, the contract was not assignable, notwithstanding there was a provision in it that—

" 'This agreement shall inure to the benefit of and bind the respective parties hereto, their personal representatives, successors, and assigns.'

"An authority very much in point is Hardy Implement Co. v. South Bend Iron Works, supra. There defendant entered into a contract with a firm composed of two persons, Hardy and Mason, for the sale of plows manufactured by it, to which a credit was to be given and certain discount advantages offered. Mason withdrew from the firm and transferred his interest in the contract to the plaintiff. Defendant refused to ship to the plaintiff the goods called for by the contract. Action was brought to recover damages alleged to have been sustained. A demurrer was interposed to the complaint, which was sustained, the court stating that where an executory contract is made between two parties and one of them consists of two

> persons, composing a partnership, and one of those persons withdraws from the firm, which is thereby dissolved, it is for the party who contracted with the firm to say whether the contract shall proceed or not. The principle upon which the rule stated is predicated is that a party cannot be forced to accept a contract which he did not, in the first instance, make, and to which he did not subsequently assent. Moore v. Vulcanite Portland Cement Co., 121 App. Div. 667, 106 N. Y. Supp. 393; Id., 204 N. Y. 680, 98 N. E. 1108; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Kemp v. Baerselman, (1906) L. R. 2 King's Bench, 604."

In *Boston Ice Co. vs. Potter,* 25 Am. Rep. 9, the defendant had purchased ice from plaintiff during 1873 but because of dissatisfaction with the manner of supply terminated his contract and made a contract for his supply with Citizens' Ice Company which business the plaintiff later bought and, without knowledge of defendant, delivered ice to the defendant. This was an action on account for ice sold and delivered. The court said in part:

> "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

In *Frissell vs. Nichols,* 114 So. 431, defendant had given a lease with option to purchase to two persons. One of the persons died and the other party together with the executor of the deceased person's estate undertook to enforce the option to purchase. Judgment for the plaintiff was appealed and the court reversed the cause, saying:

> "Accordingly where by express terms the

parties have excluded the idea of substituted performance no question upon the subject matter of the contract can arise. The death of either party in such a case terminates the contract . . ."

A contract made by one who believes he is contracting with a corporation is not enforceable where the evidence shows that the other party was not in fact incorporated.

Brighton Packing Co. vs. Butchers' Slaughtering and Melting Assn. (Mass.), 97 N. E. 780

Where one contracts to sell land to another and it later devoleps that the land is owned jointly by the seller and a third person no contract results under the rule that a person has the right to determine for himself with whom he will enter into contractual relationship.

Elder vs. Elwell (Minn.), 220 N. W. 415

There are a great many cases which apply the rules above stated to various situations where action has been brought by one individual to enforce the provisions of a contract not made originally with him but made either with such individual and another, or in which there has been a substitution of parties either by attempted assignment or otherwise. The cases hold almost unanimously that such contracts are not enforceable.

Friedlander vs. New York Plate Glass Ins. Co., 56 N. Y. S. 583 (1889)

Radliff vs. Dallinger, 4 N. E. 805 (Mass. 1886)

Cohen vs. Savoy Restaurant, 189 N. Y. S. 71

Parker vs. Dantzler Foundry and Machine Works, 79 So. 82 (Miss. 1918)

Werlin vs. Equitable Surety Co., 116 N. E. 485 (Mass. 1917)

D. C. Hardy Implement Co. vs. South Bend Iron Works, 31 S. W. 599 (Mo. 1895)

It follows from what has just been said that the evidence fails to justify the holding that any contract of any kind was made. The conversations were very vague and uncertain and certainly there was no meeting of the minds in 1935 because Barnard-Curtiss Company did not have the main contract for the construction of the dam and whatever may have been said was merely in the form of a discussion as to what might be done if the Water Board should award them the main contract. The Water Board did not award the main contract to Barnard-Curtiss Company that year and the contract certainly was not established in 1936 by the mere request made by Mr. Barnard when he asked Maehl if he would stand by the agreement made a year before and Maehl said "I just took it that we would go ahead" (R. 67). Subsequent to that conversation Maehl had himself assigned to the work as a foreman and both he and Metcalf were carried on the payroll throughout the entire job without any indication whatsoever to Mr. Barnard that they considered themselves as contractors.

But even if it should be held that the scanty evidence of a contract was sufficient to go to a jury, certainly it was a contract in which both Maehl and Metcalf were parties and unenforceable except and unless both of them had continued as partners or joint obligees so that neither of them could sue in his own name alone.

Everything that has been said in respect to the contract for clearing applies equally to the alleged contract for grubbing in Maehl's second cause of action.

In that cause of action he claimed a contract at $65.00 per acre for grubbing 20 acres which 20 acres was a part of the area cleared. He simply stated that Mr. Barnard came to him and wanted him to go ahead and grub a borrow pit (R. 86). No price was mentioned but he simply estimated the value of grubbing at $65.00 per acre and sued for that amount (R. 87). The complaint alleges that the defendant promised and agreed to pay $65.00 per acre but Maehl frankly admitted (R. 87) that nothing was said about the price but he considered the work to have that value. In other words his complaint is based upon an allegation of a specific contract and his proof upon a quantum meruit. During all of that time he was still carrying himself on the payroll as a foreman which fact completely negatives the idea that when Barnard told him to go ahead and do the grubbing, it was intended that he should be paid some contract price per acre for same. Counsel for the defendant objected to the evidence (R. 87) upon the ground that there was no meeting of the minds as to a contract and that there was

a material and fatal variance between the complaint and the proof (R. 88).

It is not thought that it is necessary to discuss at length the claim on plaintiff's sixth cause of action. That claim is for the difference between 85 cents per hour and $1.20 per hour during the time while Maehl was working at camp construction. The period of time is the same as that during which he claimed to have a contract for the clearing and grubbing and during all of that time he was working under an assignment slip from the Works Progress Administration as a foreman at 85 cents per hour and accepting that pay. There is no scintilla of evidence in the record to justify his claim in the amount of $1.20 per hour.

It is most respectfully submitted that with respect to the second third and fourth questions presented:

2. The plaintiff Ernest Maehl failed to make sufficient proof of a verbal contract on his first, second and sixth causes of action to justify submitting the same to a jury.

3. That even if such a contract had been made there is not sufficient proof of performance thereof to justify the trial court in submitting the cause to a jury.

4. That even if such contract had been made the same was between Ernest Maehl and C. A. Metcalf on one hand and Barnard-Curtiss Company on the other, whereas the pleadings allege that Ernest Maehl alone was the contracting party and thus there was a fatal variance between the pleadings and the proof.

QUESTION 5.

It is alleged in the answer (R. 26) that on the 18th day of January, 1937, Ernest Maehl and the defendant, Barnard-Curtiss Company, entered into a written contract for clearing 50 acres. The written contract is attached to the answer as Exhibit "A" and the execution admitted in the reply (R. 34).

However, the reply alleges (R. 36-37) that the plaintiff Maehl entered upon the work contemplated by said contract and that after he had cleared 24 acres and partially cleared an additional 12 acres, the contract was mutually abandoned and rescinded.

Ernest Maehl's testimony (R. 341) was that Mr. Strickland, superintendent for the defendant, came to him and said "we are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should be done."

Maehl stated (R. 341) that Strickland had said that they had a lot of fellows that were supposed to be truck drivers and Caterpillar drivers that he wanted to keep and that he would like to take over the clearing under the written contract and finish the clearing with those men because he wanted them for other work. He quoted Strickland as saying (R. 341) "you ain't making any money over wages anyway," and Maehl said, "That's right," and "all right, if you pay us for the tools or return the tools to me you can take the job over in the morning."

Counsel for the defendant moved to strike that testimony (R. 341-342) upon the ground that it had not been shown that Strickland had any authority to alter a written contract signed by the defendant and upon the further ground that the statement was an offer of oral evidence for the purpose of altering the terms of a written contract and for the further reason that there was no evidence of a consideration upon which to base an agreement of mutual cancellation.

The Montana Statute, section 7569, Revised Codes, 1935, is as follows:

> "*Written contracts—how modified.* A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

In *Continental Oil Co. vs. Bell,* 94 Mont. 123, 21 Pac. (2d) 65, a written contract had been made between the parties for the sale by Continental Oil Co. and the purchase by Bell of gasoline at "price to be charged for gasoline delivered at (naming two towns) to be four cents per gallon less than the sellers (plaintiff) quoted tank wagon price at (naming one of the above towns) on date of shipment."

The plaintiff oil company sued Bell for certain gasoline sold to him but Bell claimed, and was permitted to testify that at the time of making the contract it had been orally agreed between the parties that if at any time the contract price for the gasoline purchased was more than the "spot market price" the defendants

were to receive a refund of the difference between the two prices.

The plaintiff denied the oral agreement. There was a judgment for defendant and plaintiff appealed. The cause was reversed by the Supreme Court of Montana and the rule as to the admission of parol evidence to modify a written contract was stated as follows:

> "The test as to when parol evidence varies, adds to or contradicts a written contract was announced by this court in Hosch v. Howe, 92 Mont. 405, 16 Pac. (2d) 699, 700, quoting from Professor Wigmore as follows: 'The chief and most satisfactory index is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element.'
>
> "One of the important subjects dealt with in the written contracts was the price to be paid by the defendants for the gasoline purchased. The defendants' testimony tends to prove an oral contract to refund portions of this price, which was within the inhibition of the parol evidence rule, applying the foregoing test, unless some of the other recognized exceptions to the rule apply.
>
> "The correct application of this rule is illustrated in the following cases: Riddell v. Peck-Williamson Heating & Ventilating Co., 27 Mont. 44, 69 Pac. 241; Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064; Rowe v. Emerson-Brantingham Implement Co., 61 Mont. 73, 201 Pac. 316; Burnett v. Burnett, 68 Mont. 546, 219 Pac. 831; Swan v. LeClair, 77 Mont. 422, 251 Pac. 155.
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> ". . . . . .
>
> "Counsel for the defendants attempt to distinguish between an agreement to reduce the price

and an agreement for a refund. We are, however, unable to subscribe to any such distinction, as in both types of agreement the result is the same—a change in the price specified by the written agreement through the medium of parol evidence. In order for oral testimony to come within the exception, it must not in any way conflict with or contradict what is contained in the written contract. The written contract must remain intact after the reception of the parol evidence. (10 R. C. L. 1038.)

". . . . . .

"The defendants urge that the testimony was admissible on the theory that it tended to prove an executed oral agreement. The record contains testimony with reference to reductions in price and some refunds under the 1928 contracts which were transactions apart from those under consideration. There were no refunds or reductions under the 1929 contracts other than the billing of the gasoline sold during the last two months of that year, but that would only amount to partial performance of the oral contracts. The defendants by their counterclaims were seeking to secure the further performance of these oral contracts for the year 1929.

"Section 7569, Revised Codes 1921, provides that 'a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' An oral agreement altering a written agreement is not executed unless its terms have been fully performed, and performance on the one side is not sufficient. There must be a complete execution of the obligation of both parties in order to bring the modification within the terms of the statute. (Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159; Henehan v. Hart, 127 Cal. 656, 657, 60 Pac. 426; Thompson v. Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81; Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060; Harloe v.

> Lambie, 132 Cal. 133, 64 Pac. 88. Also see Curtis v. Parham, 49 Mont. 140, 140 Pac. 511; Armington v Steele, supra.)"

The case of Continental Oil Co. vs. Bell, 94 Mont. 123, 21 Pac. (2d) 65, was sustained in *Griffiths vs. Thrasher,* 95 Mont. 210, 26 Pac. (2d) 995. In the latter case plaintiff sued to foreclose a chattel mortgage. The defense was that the period for the time of payment of certain of the notes had been extended by an oral agreement. The proof was that the defendant had actually paid, as an independent consideration, the sum of $1000.00 for the extension of time and the Montana Supreme Court held that there was in fact an executed oral agreement for the extension of time. However, the court re-affirmed the doctrine laid down in Continental Oil Co. vs. Bell and held that there was actually a modification accompanied by a new and adequate consideration. In the course of the opinion, however, the Montana Supreme Court pointed out that the defendant was not seeking a rescission of the contract but actually relying upon it affirmatively and suing for damages resulting from an alleged fraud. The court said, on page 228 of the opinion:

> "However, it does not appear from the pleading that defendant is seeking a rescission of the contract; in fact, it affirmatively appears that she elected to affirm the contract and sue for damages resulting from alleged fraud."

It was held in *Armington vs. Stelle,* 27 Mont. 13, 69 Pac. 115, that a subsequent oral agreement between the parties to a written sublease of a mining claim to

the effect that in case the sublessor should buy the property the lease would be extended, was void, being merely an executory agreement without consideration.

An unexecuted oral agreement, the effect of which was to alter the terms of a promissory note by extending the time of payment and changing the amount due constituted no defense to the enforcement of the note, and evidence tending to prove the agreement was improperly admitted.

Lish vs. Martin, 55 Mont. 582,
179 Pac. 826.

Parol evidence of an unexecuted oral agreement offered against a tenant under a written lease that he would surrender the lease and vacate the premises as soon as the landlord could procure a new tenant was inadmissible.

Quong vs. McEvoy, 77 Mont. 99,
224 Pac. 266.

The case of Griffiths vs. Thrasher, 95 Mont. 210, 26 Pac. (2d) 995, is the leading Montana case on the matter of modification of a written contract by an executed oral agreement and it clearly requires that an independent consideration shall be paid and, in conformity with Continental Oil Co. vs. Bell, holds that the executed oral agreement must be separate and distinct from the terms of the written contract and entirely collateral in nature.

Certainly where a man takes a contract to clear 50 acres a mutual agreement to stop at 24 acres is neither

collateral to nor independent from the original agreement. It is simply an offer to prove that the parties agreed upon 24 acres instead of 50 acres and without any consideration for the agreement. It would be no different from a situation where a contractor contracted to build a five story building and then stopped at two stories upon the theory that the owner of the building had agreed that he need not go any further. It is most respectfully submitted therefore that the evidence of the conversation between Mr. Maehl and Strickland was inadmissible first, because it was made by Strickland without showing his authority therefore and second, because it is clear violation of the parol evidence rule.

This being true, and since it is uncontradicted that Barnard-Curtiss Company advanced Maehl $4779.84 (R. 240) during the time while Maehl was clearing 24 acres and partially clearing 12 additional acres, and uncontradicted that Barnard-Curtiss Company expended an additional $6862.85 in completing the clearing under that written contract, and since these two items total $11,642.69, and since it is equally clear that had Maehl finished the 50 acres he would have received only $5000.00, Barnard-Curtiss Company was damaged to the extent of $6642.69 on its counterclaim under the written contract.

QUESTION 6

The last question raised by the defendant has to do with its motion for a reference (R. 56). The motion is based upon the provisions of Rule 53(b) of the Rules of Civil Procedure of the District Courts of the United States. The rule reads as follows:

> "(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; . . . ."

The motion is supported by the affidavit of Howard Toole, one of the Attorneys for the defendant, stating the reasons for the motion.

The motion was timely made and it is submitted that the issues in this cause were actually too complicated to be passed upon intelligibly by a jury. The plaintiff had seven causes of action in his complaint, to-wit:

1. An alleged oral contract for clearing.
2. An alleged oral contract for grubbing.
3. An alleged oral contract for furnishing 6000 stulls which was later dismissed.
4. An alleged oral contract on quantum meruit for hauling men to the West Fork road camp of the defendant.
5. An alleged oral contract on quantum meruit for hauling men to the Flint Creek dam job.
6. An alleged oral contract for an increase in wages on the quantum meruit, and
7. An alleged oral contract for furnishing tools to the defendant.

The defendant denied all of the seven alleged contracts and counterclaimed:

1. For damages for breach of an oral contract to clear 6.98 acres of land on the damsite (later dismissed).

2. For damages for breach of a written contract for clearing 50 acres on the reservoir site.

During all of the time Maehl was working as a foreman on the time books and the Works Progress Administration assignment slip and was not only working on the clearing but also hauling men and working on the camp site, all simultaneously.

It is submitted that no jury could pass upon the nine claims involved with any degree of intelligence all of which is evidenced by the verdict (R. 357) giving the plaintiff $3368.91.

Counsel for the defendant objected to the form of the verdict and it is impossible in this record to arrive at any figure upon which the verdict might be said to rest.

CONCLUSION

The appellant herein most respectfully submits to this court:

First, that Metcalf should have been joined as a party to this action under Rule 14 and Rule 22 of the Rules of Civil Procedure on the motion of the defendant.

Second, that the plaintiff Maehl failed to make a

case for the jury (a) because he failed to make any proof sufficient to justify the court in finding that any contract for clearing or for grubbing or for wages was ever made by the defendant; (b) even if the meager proof submitted was sufficient to go to a jury, it is uncontradicted that the contract, if any, included Metcalf and there was a fatal variance between the pleadings and the proof in that the action was brought by Maehl alone and the proof showed conclusively that Metcalf was a party to the contract, if any.

Third, that the written contract for clearing 50 acres alleged in defendant's second counterclaim was admittedly made and that it was error for the court to permit Maehl to offer testimony of mutual cancellation in that such testimony was inadmissible under the parol evidence rule.

Fourth, that there was no proof whatsoever in Maehl's sixth cause of action for an increase of wages.

Fifth, that the cause was too complicated as set up by the pleadings to justify submission thereof to a jury for a general verdict and the same should have been referred to a master.

Sixth, that the court should have sustained defendant's motion for a directed verdict on the first, second and sixth causes of action (R. 353-354) and that the court should have sustained defendant's motion for the direction of a general verdict in the amount of $3320.09, that being the uncontradicted amount paid out by the defendant in excess of any amounts which

Maehl could have earned had he had the contracts alleged in the complaint.

Respectfully submitted.

Howard Toole

W. J. Rooney

Attorneys for Appellant.

Service of the foregoing Brief and receipt of three copies thereof accepted this ..... day of April, 1940.

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Attorneys for Appellee.